92-1772

No.

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

BROUGHTON LUMBER CO.,

Petitioner,

v.

COLUMBIA RIVER GORGE COMMISSION, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do the jurisdictional provisions of the Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544m(b)(4)-(6), confer federal subject matter jurisdiction over the Columbia River Gorge Commission for review of a land use decision it has made?

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On Petition for Writ
of Certiorari to the Ninth Circuit
Court of Appeals

The respondent Columbia River Gorge Commission respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the Ninth Circuit in this case. That opinion is reported at 975 F.2d 616 (1992).

STATEMENT OF THE CASE

I. The Development of Federal and State Legislation

The Columbia River Gorge is a remarkable constellation of natural resources with great significance. The Columbia River forms the boundary between Oregon and Washington for a portion of its length and is the largest river in the country that flows into the Pacific Ocean.[1] Efforts to manage the Columbia River Gorge date back to 1893 when Congress created the Cascade Range Forest Reserve which later became the Mount Hood National Forest. In 1937, the Pacific Northwest Regional Planning

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[1]The explorers Lewis and Clark described with awe the area's monumental rock formations and scenic beauty during their famous expedition through the Gorge in 1805. 99 Congr. Rec., H 11121 (Oct. 16, 1986). A more recent observer aptly summarized the special nature of the area:

> The beauty of this spectacular canyon is breathtaking. Waterfalls cling to the mountainsides. Giant cliffs and rocks stand out as sentinels against the wind and rain. The great Columbia River moves silently and smoothly toward its destined meeting with the Pacific Ocean. The peaks of Mount St. Helens, Mount Adams, and Mount Hood loom as reminders of the fiery prehistoric past.

Senator Daniel Evans, 99 Congr. Rec., S 15642 (Oct. 8, 1986).

Commission considered creating an interstate park in recognition of the Gorge's national importance. During the 1950's, both Oregon and Washington created separate Gorge Commissions but they were ineffective due to lack of funding as well as opposition by special interest groups.

In the past decade, elected officials in the Northwest sought a comprehensive approach to protecting the Gorge as a region. Congressional leaders and the Governors of Oregon and Washington reached agreement on the need for federal legislation to assist the states' efforts to protect the area.

In the beginning, proposals ranged from complete federal regulation of land use in the Gorge to bi-state control with limited involvement from the national government. During the extensive debate on these options between 1982 and 1986, federal and state officials considered the views of Gorge residents and other interested citizens. Over time, support developed for a partnership with participation by federal, state and local agencies. Blair, *The Columbia River Gorge National Scenic Area: The Act, Its Genesis*

and Legislative History, 17 ENVTL. L. 863 (1987). From this consensus, after years of negotiations, the Columbia River Gorge National Scenic Area Act was created. 16 U.S.C. § 544, *et seq.* (1986). Congress approved the Scenic Act on October 17, 1986. President Reagan signed it on November 17, 1986.

II. The Structure of the Columbia River Gorge National Scenic Area Act

A. Overview

Congress determined the purposes of the Scenic Act are two-fold: first, "to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational and natural resources of the Gorge"; second, to protect and support the economy of the Gorge "by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with" the first purpose. § 544a. To accomplish these objectives, the Scenic Act has three main features. First, it designates a specific portion of the

Columbia River Gorge as a National Scenic Area[2] and divides the region into three categories: (1) urban areas, the regulation of which is exempt under the Act; (2) special management areas; and (3) the remainder, referred to as general management areas. § 544b.[3]

Second, the Scenic Act contains the advance consent of Congress to the Columbia River Gorge Compact between Oregon and Washington to establish a regional agency, the Columbia River Gorge Commission, with regulatory authority over resources and land use within the Scenic Area. § 544c. As a condition to its consent, Congress required, inter alia, that the states vest in the Gorge Commission the powers necessary to implement the Act and

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[2]The Scenic Area lies to the east of Portland, Oregon and Vancouver, Washington. It extends 80 miles along the Columbia River, stretching from the Sandy River on the west to the Deschutes on the east. The Scenic Area covers portions of six counties: Clark, Skamania and Klickitat in Washington, and Multnomah, Hood River and Wasco in Oregon.

[3]The urban areas include 13,000 acres, the special management areas 112,000 acres and the general management areas 113,000 acres. 99 Congr. Rec., H 10485 (Oct. 16, 1986).

that the Commission carry out its duties in accordance with the terms of the Act. *Id.*[4]

Third, the Scenic Act directed the Secretary of Agriculture to carry out planning functions in close cooperation with the Gorge Commission and to adopt interim guidelines for the Scenic Area which identify land use activities inconsistent with the Act. § 544h. The guidelines apply until land use ordinances are adopted in each county.

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[4]Congress may condition consent to a compact with specific requirements. Seattle Master Builders v. Pacific N.W. Elec. Power, 786 F.2d 1359, 1364 (9th Cir. 1986), cert. denied, 479 U.S. 1059, 107 S. Ct. 939, 93 L.Ed. 2d 989 (1987). The Compact Clause of the Constitution, Art. I, § 10, cl. 3, provides an "important device for fashioning new instruments adopted to new strategies." Frankfurter & Landis, *The Compact Clause of the Constitution -- A Study in Interstate Adjustments*, 34 Yale L.J. 685, 688 (1925). As the Ninth Circuit declared in upholding the constitutionality of the Columbia River Gorge National Scenic Area Act: "The Columbia River Gorge Compact is just such an innovative solution to a difficult interstate land preservation problem." Columbia River Gorge United v. Yeutter, 960 F.2d 110 (9th Cir. 1992) cert. denied sub nom. Columbia Gorge United v. Madigan, 121 L.Ed. 2d 128 (1992).

B. The Columbia River Gorge Commission

The Scenic Act specifies the composition of the Gorge Commission with three members appointed by the Governor of each state and one member appointed by each of the six counties. § 544c(a) The Secretary of Agriculture is designated a non-voting member of the Commission. § 544c(a)(C)(iv)

The Act required the Gorge Commission to complete several studies and create land use designations for a plan governing all development activities in the Gorge. § 544d The plan must include designations and guidelines developed by the Secretary for specific areas of the Gorge where the federal government is the largest landowner. § 544d(c)

The Act directed the Gorge Commission to review all proposed development during the interim period prior to adoption of the plan. § 544h(c) Development shall be approved only if it is consistent with the Act and with the interim guidelines adopted by the Secretary. Id.

C. County Zoning Ordinances

Once the Gorge Commission adopts the plan, the Act authorizes each county to adopt a land use ordinance consistent with it. § 544e(b) If a county does not adopt an ordinance, the Commission must do so instead. § 544e(c)

III. The Columbia River Gorge Compact

In 1987, Oregon and Washington enacted legislation adopting the Scenic Act in the Columbia River Gorge Compact. Or. Rev. Stat. § 196.150; Wash. Rev. Code § 43.97.020. During May and June of 1987, the Governors of both states and the counties in the Scenic Area appointed the members of the Gorge Commission. The Compact delegates to the Commission the authority to carry out the duties defined in the Act.

IV. Procedural Background And Facts

Petitioner, Broughton Lumber Company, owns a 108.53-acre parcel of property in Skamania County, Washington within the National Scenic Area. Petitioner submitted an application to the Gorge Commission in 1988 to divide the property into three

sections for residential development outside of an urban area. The director of the agency denied the application. A-48 Petitioner appealed and the Gorge Commission upheld the decision. A-46 Since the case arose in the interim period prior to the adoption of ordinances based on the plan, the Gorge Commission applied the provisions of the Act and guidelines as well as its rules in making the decision.[5]

Petitioner filed a complaint in the U.S. District Court for the District of Oregon against the Gorge Commission, the states of Oregon and Washington and the United States.[6] The District

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[5]An ordinance that implements the Scenic Act will take effect in Skamania County, where the property is located, in the near future. The interim guidelines and the rules of the agency will no longer apply to petitioner's future development activities. For this reason, the claim made here is largely moot. Contrary to petitioners assertion, it has never been established that the interim guidelines deprive "many landowners of all economically viable use of their property." (Petition, 10) In addition, the Gorge Commission subsequently approved petitioners proposal for a commercial resort on the same property that is the subject of this case on April 10, 1990.

[6]The procedural background is taken from the Ninth Circuit's decision, Broughton Lumber Company v. Columbia River Gorge Commission, 975 F.2d 616, 618 (1992).

Court dismissed the inverse condemnation claim against the states and the United States. The District Court dismissed petitioner's declaratory judgment claim against the Gorge Commission for lack of subject matter jurisdiction. The District Court also dismissed petitioner's taking claim against the Gorge Commission because it was not ripe for judicial review. Petitioner failed to obtain a final decision in regard to use of the property or utilize the procedures provided for by the states for just compensation.

Petitioner appealed and the Ninth Circuit Court of Appeals affirmed.[7] Broughton Lumber Company v. Columbia River Gorge Commission, 975 F.2d 616 (1992) Petitioner now seeks review in the Supreme Court of dismissal of the declaratory judgment claim against the Gorge Commission for lack of subject matter jurisdiction rather than the taking . (Petition, 14-24).[8]

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[7]Petitioner did not appeal the District Court's dismissal of the United States or the Secretary of Agriculture to the Ninth Circuit.

[8]Petitioner did not seek review in this Court of the Ninth Circuit's affirmance of the dismissal of Washington and Oregon on Eleventh Amendment grounds.

In the declaratory judgment claim in the District Court, petitioner merely alleged the Gorge Commission

> "erred in denying plaintiff's application in one or more of the following particulars:
>
> a. in erroneously interpreting and applying the standards in the Gorge Act and the regulations promulgated thereunder;
>
> b. in issuing an order not supported by substantial evidence; and
>
> c. by considering evidence not in the record.
>
> The Commission's action adversely affects plaintiff and is contrary to law. Pursuant to 16 U.S.C. § 544 m(b)(4), a declaratory judgment should issue setting aside and terminating the Commission's action as invalid." SUPP A 3-4.

Contrary to petitioner's assertion in this Court, it did not allege the Gorge Commission's decision "violated both the express conditions Congress placed on the interstate compact and the regulations promulgated under the compact." (Petition, 11) SUPP A 3-4. Nor did petitioner allege any "express conditions" of Congress or "regulations promulgated" under the Compact that were violated. Petitioner's only claim was that the Gorge

Commission erred in denial of the proposed land division and development.

REASONS WHY THE PETITION SHOULD BE DENIED

This case presents an ordinary claim for review of a land use decision. Petitioner seeks to challenge the standards and evidence considered by the Gorge Commission in its denial of a permit for development through a declaratory judgment claim. Thus, while the petition in this Court is framed in terms of a far-reaching principle concerning interstate compacts, the heart of the case is simply a request for review of a land use decision.[9]

Contrary to petitioner's assertion, the declaratory judgment claim did not make any allegations even suggesting "the federal government and a bi-state Commission have displaced six counties as the regulators of all land use" in the Gorge or that the Gorge Commission has "far reaching zoning authority but no power to compensate private landowners for regulatory takings." (Petition

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[9] As the U.S. Magistrate found in this case: "Plaintiff seeks a declaratory judgment finding unlawful the Commission's refusal to allow plaintiffs proposed property division." A-38

5,6) In fact, a regulatory taking claim was never alleged in the declaratory judgement pleadings and the dismissal of the taking claim is not the object of the petition for review in this Court. A 3-4.

In addition, petitioner's assertion that "disputes regarding compact agencies' authority must be subject to federal judicial review" is without foundation in the record. (Petition, 7) The declaratory judgment claim did not allege any such dispute, the necessity for federal judicial review or, contrary to petitioner's contention now, any prospect for "conflicting and potentially irreconcilable directives of the courts of the participating states." (Petition, 8)

The crux of this case is why jurisdiction over appeals or challenges to decisions of the Gorge Commission relating to land use development lie in state court under the specific provisions of the Scenic Act. At no point was the District Court or the Ninth Circuit required to address some alleged flaw in the Scenic Act or

the Columbia River Gorge Compact because "citizens will be left without meaningful judicial review and remedies." (Petition, 14)

The Scenic Act expressly provides for jurisdiction over an appeal or challenge to an action of the Gorge Commission in state court. The Ninth Circuit correctly concluded jurisdiction is in state court. Moreover, petitioner has never demonstrated why jurisdiction for review of a land use decision in state court is not adequate.

Petitioner's position eviscerates the role of the states in review of land use decisions regarding its citizens. First, it is contrary to the states's purposes and the provisions of the Scenic Act and the Compact. Second, it contravenes basic principles of property law. Property law has traditionally been defined by existing rules that stem from an independent source such as state law. See Board of Regents v. Roth, 408 U.S. 564, 577 (1971).

Petitioner also fails to show why this case is of sufficient importance to merit this Court's review. The declaratory judgment

claim did not raise any seminal issues relating to interstate compact law that justify granting the petition for certiorari.

Petitioner has not demonstrated the Ninth Circuit's analysis conflicts with any other circuit. Nor does petitioner demonstrate that the decision is inconsistent with this Court's recent decisions such that the Court should grant certiorari as a function of its supervisory powers over the lower federal courts. In any event, petitioner fails to demonstrate this case involves a substantial federal question.

I. The Provision In The Columbia River Gorge National Scenic Act That Jurisdiction For Review Of A Land Use Decision Is In State Court Does Not Present A Question That Merits Review By This Court

The language of the Scenic Act expressly provides for jurisdiction over appeals from land use decisions of the Gorge Commission in state court. The judicial review and jurisdiction sections of the Act state:

> Judicial remedies.
>
> ***
>
> (4) Judicial review

Any person or entity adversely affected by--
(A) any final action or order of a county, the Commission, or the Secretary relating to the implementation of the Act;
(B) any land use ordinance or interim guideline adopted pursuant to this Act;
(C) any appeal to the Commission pursuant to this section;
(D) any civil penalty assessed by the Commission pursuant to paragraph (a)(3) of this subsection may appeal such action or order by filing in any of the courts specified in paragraph (5) of this subsection, within sixty days after the date of service of such order or within sixty days after such action is taken, a written petition requesting such action, order, land use ordinance, interim guideline, or appeal taken to the Commission be modified, terminated, or set aside.

(5) Federal court jurisdiction

The United States district courts located in the State of Oregon and Washington shall have jurisdiction over--
(A) any criminal penalty imposed pursuant to [the Act] ...
(B) any civil action brought against the Secretary pursuant to [the Act] ...
(C) any appeal of any order, regulation or other action of the Secretary taken pursuant to [the Act] ...

(6) State court jurisdiction

The state courts of the States of Oregon and Washington shall have jurisdiction--

> (A) to review any appeals taken to the Commission pursuant to [the Act] ...
> ***
> (C) over any appeal of any order, regulation, or other action of the Commission ...
> ***

16 U.S.C. § 544m(b) (4-6).

A literal construction of the Scenic Act is required. Green v. Biddle, 8 Wheat. 1, 88 (1823) (interstate compact for claims to land). The express terms of the legislation control its interpretation and a court may not order relief inconsistent with the language used. Texas v. New Mexico, 462 U.S. 554, 564 (1983) (interstate compact for allocation of water). Since the Scenic Act provides for judicial review of an appeal or challenge to decisions of the Gorge Commission in state court, this case does not present any issue that merits review by this Court.

Petitioner contends that because paragraph (4) of the judicial remedies section of the Scenic Act places jurisdiction in "any of the courts specified in paragraph (5)", there is jurisdiction in federal court to review the agency's decision. This position ignores the plain language in paragraph (5) providing federal court

jurisdiction for actions involving the Secretary of Agriculture. 16 U.S.C. § 544m(b)(5).

Petitioner's argument also renders paragraph (6) of the judicial remedies section of the Scenic Act meaningless. This provision in the Act specifically provides jurisdiction in state court for actions involving "any appeal of any order, regulation, or other action of the Commission or a county taken pursuant to paragraph (4) of this subsection." 16 U.S.C. § 544m(b)(6). (emphasis supplied)

In addition, after Congress passed the Scenic Act, Oregon and Washington adopted the Columbia River Gorge Compact. Or. Rev. Stat. § 196.150; Wash. Rev. Code § 43.97. The Compact incorporated the provisions of the Act and they are "declared to be the law" of the state. Or. Rev. Stat. § 196.150; Wash. Rev. Code 43.97.015. The Compact established the authority of the Gorge Commission "to perform all functions and responsibilities in accordance with the provisions" of its terms and those of the

Scenic Act. Or. Rev. Stat. § 196.150; Wash. Rev. Code 43.97.015.

The Compact does not contain any language that suggests the states gave up jurisdiction to review land use decisions of the regional agency they created. On the contrary, Oregon and Washington have vigorously contended the Scenic Act and the Compact are the "product of mutual cooperation between federal and state governments to achieve a result satisfactory to both states." Columbia Gorge United v. Yeutter, supra at 112.

Moreover, the Compact between the states is a contract. Green v. Biddle, supra, 92. The provisions of the Compact are equally obligatory on citizens of both states which provides the "uniform system of laws" the Scenic Act created. Poole v. Fleeger, 11 Pet. 185, 210 (1837); 16 U.S.C. § 544c(b). The interstate agency, in applying these laws, ensures they are binding on development activities in both states.

The Court deals with the Compact the way it is structured. Texas v. New Mexico, supra, 565. (rejecting attempt to amend

provisions of compact by interpretation) The Court also does not engage in formulating policy. "...where the words of the law, treaty or contract have a plain and obvious meaning, all construction, and hostility with such meaning, is excluded." Green v. Biddle, supra, 89-90.

In addition, the legislative history also supports the plain meaning of the statute. Congress considered but did not adopt a bill which would have provided for exclusive federal court jurisdiction for all actions brought against the Gorge Commission pursuant to the Scenic Act. H.R. 4161, 99th Cong. 2d Sess. (1986); H.R. 5583, 99th Cong. 2d Sess. (1986); H.R. 5625, 99th Cong. 2d Sess. (1986) In its place, the Senate passed S. 2055, which mandated federal court jurisdiction in cases involving criminal actions brought under the Scenic Act and in cases concerning activities of the Secretary. In a section by section analysis of the bill, the provisions of the judicial review section were specifically analyzed. 99 Congr. Rec. S 15645 (Oct. 8, 1986).

The House passed H.R. 5705, which eventually became the Scenic Act. In reviewing H.R. 5705, Senator Gorton, a prime sponsor of the legislation in the Senate, noted "it is extremely close to the bill [S. 2055] that the Senate passed on October 8th." Cong. Rec. S 16878 (Oct. 17, 1986). In terms of the judicial review provisions, the two bills were exactly the same. Congress even rejected an attempt by Representative Robert Smith to amend the judicial review section in the House to provide federal court jurisdiction. Congr. Rec. H 11139 (Oct. 16, 1986); Congr. Rec. H 11142-43 (Oct. 16, 1986).

There is no doubt about the allocation of jurisdiction by Congress between the state and federal courts in the Scenic Act. The language is consistent with the state and federal relationship that was forged in the Compact. Federal courts have jurisdiction limited to cases where an action of the Secretary of Agriculture is challenged or a criminal penalty is sought. State courts have

jurisdiction over decisions of the Gorge Commission.[10] For these reasons, the policy choices regarding jurisdiction have been resolved by Congress and petitioner does not present a question that merits review by this Court.

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[10]The U.S. Magistrate found another case involving construction of the Scenic Act was applicable:

> Plaintiff seeks a declaratory judgment finding unlawful the Commission's refusal to allow plaintiffs proposed property division. A similar situation arose in Columbia Gorge United v. Yeutter, CV No. 88-1319-PA (May 23, 1990). Plaintiffs in Yeutter were land owners who sought permission from the Commission to develop their land within the Columbia Gorge Scenic Area. The Commission denied plaintiffs' requests and plaintiffs' appeals. Plaintiffs brought their action in this court. Judge Panner dismissed the action, stating in dicta that "[t]he Gorge Act and the Compact specify that jurisdiction over appeals or challenges to commission or county actions be placed in state courts, while providing jurisdiction to review action taken by the secretary [of agriculture] in federal district court. 16 U.S.C. § 544m(b)(4-6). Id. at 30. Although the quoted passage from Yeutter is dicta, I accept it as persuasive authority.

Magistrate's Findings and Recommendation, A 38

II. The Hypothetical Assertion of Federal Question Jurisdiction For Review Of A Land Use Decision Under The Columbia River Gorge National Scenic Area Act Does Not Present A Question That Merits Review By This Court

While dressed in the garb of federal question jurisdiction, petitioner's thrust is a request for review of a land use decision of an agency established by an agreement or compact between two states. The taking claim is not before the Court and petitioner does not raise a constitutional question. Moreover, there is no conflict between the states and they are not parties in the appeal.

Petitioner's plea for federal court jurisdiction is based on a hypothetical situation and not the facts in this case. The petition states as follows:

> If, however, disputes regarding the Gorge Commission's authority could be adjudicated only in the state courts of Oregon and Washington, the fundamental goal of interstate uniformity could be frustrated. The Commission would be subject to the competing, inconsistent, and perhaps inevitably irreconcilable mandates of the courts of two co-equal sovereigns.

(Petition, 18-19)

Quite to the contrary, this is not a case where "uniformity" has been frustrated or the Gorge Commission subject to "inconsistent" or "irreconcilable" mandates. The pleadings and the record do not establish any conflict in state court decisions or any lack of uniformity in review of a land use decision of this kind.[11] Petitioner simply fails to establish why jurisdiction in the courts of Washington and Oregon raises a substantial federal question this Court should review.

Moreover, the Ninth Circuit correctly concluded that since the Scenic Act is more specific than the general federal jurisdiction statute, the Scenic Act must control. Busic v. United States, 446

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[11]The Gorge Commission has rendered 1200 development review decisions since 1987. These decisions have given rise to several appeals or legal challenges. All of the land use decisions have been heard in the state courts of Oregon and Washington. See, Miller v. Columbia River Gorge Commission, 118 Or. App. 553, 848 P2d 629 (1993) (proposed land division and taking claim); Schaefco v. Columbia River Gorge Commission, 112 Wn.2d 366, 849 P2d 1225 (1992) (proposed development). Other cases currently pending include Bryant v. Columbia River Gorge Commission, Oregon Court of Appeals No. A75952 (quarry operation and taking claim) and Tucker v. Columbia River Gorge Commission, Washington Court of Appeals No. 14748-3-II (proposed land division and taking claim).

U.S. 398, 406 (1980) This result is especially compelling because jurisdiction is a critical component of the Act and the Compact the states adopted which preserves traditional notions of federalism. What Congress and the states have provided for jurisdiction to review this land use decision does not merit review by this Court.

In addition, any decision by this court interpreting the Scenic Act will have little bearing on other interstate compacts. Each compact has it own congressional authorization with specific purposes and standards. Thus, this case does not present an issue that will contribute to the understanding of compact law in general.

The Ninth Circuit's determination that the taking claim was not ripe supports this conclusion as well. Petitioner failed to seek compensation from Oregon or Washington prior to suit in federal court. Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-195 (1984). If a litigant could pursue a taking claim in state court and a challenge to the same underlying land use decision in federal court simultaneously, it would nullify the

"uniform system of laws" provided in the Scenic Act and the Compact. 16 U.S.C. § 544c(b). Such needless conflict would entrap citizens in a labyrinth Congress and the states carefully eliminated. Petitioner has a forum for appeal in state court and has not shown why this Court should consider federal court jurisdiction with the facts presented.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted this 12th day of August, 1993.

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